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IN THE

Supreme Court of the United States

October Term, 1957

No. ~~1087~~ 191

JOSEPH FRANK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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JOSEPH FRANK,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Joseph Frank, petitioner, prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered May 15, 1957, affirming petitioner's conviction of income tax evasion.

OPINIONS BELOW.

The opinion for the United States District Court for the Western District of Pennsylvania is unreported.

The opinion of the United States Court of Appeals for the Third Circuit filed May 15, 1957, has not been reported as yet. A copy of its opinion appears in the appendix at page 32.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1). The opinion and Judgment of the Court of Appeals for the Third Circuit was entered on May 15, 1957. A copy of its Judgment appears in the Appendix at page 38.

The judgment of the Court of Appeals in the instant case is squarely in conflict with decisions in other circuits, as to the required proof of "likely source" of additional income and as to suppression of evidence obtained by special agents and Internal Revenue Agents of the Internal Revenue Service through alleged acts of fraud, deceit and misrepresentation.

Cases that are in conflict and disagreement with the instant case as to proof of likely source of income are *Massei vs. United States*, 241 F. 2nd 895, 1 Cir.; *Thomas v. Commissioner*, 1 Cir. 1956, 232 F. 2nd 520, 526, and *Brock vs. United States*, 223 F. 2nd 681-86.

Cases that are apparently in agreement with the instant case are *United States vs. Ford*, 2 Cir. 1956, 237 F. 2nd 57, 60; *Ford v. United States*, 5 Cir. 1956, 233 F. 2nd 56, Cert. denied 1956, 352 U. S. 833, 77 S. Ct. 49, 1 L. Ed. 2d 53, and *United States v. Adonis*, 3rd Cir., 221 F. 2nd 717.

Cases that are in conflict with the instant case as to "suppression of evidence" are *United States v. Achilli*, 234 F. 2nd 797; *Lipshitz vs. United States*, 117 F. Supp. 466; *Wolrich v. United States*, 119 F. Supp. 528 and 129 F. Supp. 528, and *Guerrina vs. United States*, 112 F. Supp. 126.

The several questions raised in this petition are of substantial importance, specifically at least, in the interpretation, administration and enforcement of the Internal Revenue Statutes and Income Tax laws. As there are conflicts and disagreements and lack of uniformity in the lower Courts as to them it is respectfully submitted that it is now necessary for a clarification of the issues by the Supreme Court.

QUESTIONS PRESENTED FOR REVIEW.

1. Was there sufficient evidence to support the Court below in its refusal to grant defendant's motion to suppress the use as evidence against defendant the information and evidence derived, directly or indirectly, from the defendant's books and records given first to Revenue Agent Cornell and the net worth statement, books, records, and oral admissions later given to Special Agent Good and Internal Revenue Agents Donahoe and Levy, in their investigation of defendant; and did it err in so doing?

2. Was there sufficient evidence to support the Court below in its refusal of defendant's motions for directed judgments of acquittal; and did it err in so doing?

3. In an income tax evasion prosecution, is the government required to prove the corpus delicti or some substantial portion thereof by independent and direct evidence before the Defendant's alleged extra-judicial admissions may be introduced as evidence against him?

4. Did the Trial Judge commit prejudicial and reversible error by allowing the members of the jury to see and have the use of the Government's Exhibit 50?

STATUTES, CONSTITUTIONAL AMENDMENTS AND FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED.

Section 145(b) of the Internal Revenue Code of 1939, 26 U. S. C. 145(b).

This section provides: "Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, be fined not more than $10,000.00, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Section 3761(a) of the Internal Revenue Code of 1939, 26 U. S. C. 3761(a):

This section provides: "Compromises (a) Authorization. The Commissioner, with the approval of the Secretary, or of the Under Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense."

Fourth Amendment.

The 4th Amendment to the Constitution of the United States provides as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searchers and seizures, shall not be violated,

and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized."

The 5th Amendment to the Constitution of the United States provides as follows: "No person shall be held to answer for a capital, or otherwise infamous crime, unless upon a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property to be taken for public use, without just compensation."

Federal Rule of Criminal Procedure 41(e) provides as follows: "Motion for return of property and to suppress Evidence. A person, aggrieved by an unlawful search and seizure may move the District Court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the Court in its discretion may entertain the motion at the trial or hearing."

STATEMENT OF THE CASE.

This is a petition for a Writ of Certiorari relating to a decision of the Court of Appeals for the Third Circuit which affirmed a judgment of the United States District Court for the Western District of Pennsylvania, entered on December 11, 1956, convicting petitioner of an alleged violation of Section 145(b) of the Internal Revenue Code, 26 U. S. C. 145(b).

Under the indictment (4a) filed March 9, 1955, the petitioner was charged with willfully and knowingly attempting to defeat and evade part of the income taxes due and owing by him and his wife for the calendar year 1948 by filing and causing to be filed a false and fraudulent joint income tax return on behalf of himself and his wife for 1948, wherein he knowingly understated his net income and taxes due thereon for the year 1948.

The defendant pleaded not guilty to the charge of the indictment; on April 6, 1955, he filed a motion for a Bill of Particulars. In response thereto the Government filed a Bill of Particulars (Ex. D-1) indicating its case was based upon the bank deposits expenditures method of proof corroborated by the net worth expenditures method in arriving at the defendant's correct taxable income for 1948.

On October 13, 1955, defendant filed a motion to suppress evidence and for the return of property as provided by Federal Rule of Criminal Procedure 41(e) based upon violation of his constitutional rights as provided by the 4th and 5th amendments to the Constitution of the United States (5a). An answer to said motion was filed thereto by the Government and a hearing was had on said motion to suppress before Honorable John L. Miller (also the trial judge) on November 14 and 18, 1955. On December 29, 1955, an order was filed by the hearing Judge denying defendant's motion to suppress evidence and for the return of

property, without prejudice however, to petitioner's right to object to admission of such evidence upon trial of the action (91a). On January 4, 1956, the hearing Judge filed his opinion pertaining to petitioner's motion to suppress evidence (91a-94a).

The cause came on for trial before District Judge John L. Miller and a jury at Pittsburgh, Pennsylvania, from June 19, 1956, to June 29, 1956. At the beginning of the trial petitioner renewed his motion and moved for the suppression of the evidence obtained by the Government's agents from the petitioner in violation of his constitutional rights as provided by the 4th and 5th Amendments to the Constitution of the United States. The motion was denied by the Trial Judge (96a). During the trial petitioner objected to the testimony of the various witnesses based upon the said motion to suppress.

At the close of the Government's case the petitioner moved again for the suppression of the evidence and for a directed judgment of acquittal which were denied by the trial Judge (353a).

The petitioner then rested his case and again moved for suppression of the evidence and for a directed judgment of acquittal which were denied by the Trial Judge (353a-359a). The Court denied the petitioner's motion to suppress evidence and reserved decision on the motion for a directed judgment of acquittal (362a).

On July 3, 1956, petitioner filed a motion for a new trial (380a-381a). A hearing was had on the said motion before Judge Miller on September 5, 1956, and on December 4, 1956, the Trial Judge filed an opinion and order denying petitioner's motions for a new trial and for a directed judgment of acquittal (393a).

On December 11, 1956, the Court adjudged the petitioner guilty and the Court sentenced him to be imprisoned for a period of eighteen months and to pay a fine of $2,500.00, and costs of prosecution (393a). An appeal was taken by petitioner from said Judgment and commitment to the

Court of Appeals for the Third Circuit which after hearing argument affirmed the said Judgment.

During the year 1948, the year involved, the petitioner, Joseph Frank, was engaged, as an equal partner, with Thomas Conlin, in a two-person partnership, doing business under the name "Royal Vending Service", located in Homestead, Allegheny County, Pittsburgh, Pennsylvania, from which he received and reported income. He and his wife also received rental income from real estate and interest on a savings account in a federal savings and loan association.

Jerry Y. Hirsch was the bookkeeper for the petitioner and the partnership, Royal Vending Service. P. A. Love and Company, Certified Public Accountants were the petitioner's and said partnership's accountants. The regular books of the partnership were kept at the company's Homestead office but the general ledger was kept by and in P. A. Love and Company's office (154a).

P. A. Love and Company prepared the petitioner's and partnership's tax returns for year 1948 and for years previous and subsequent. Information for preparation of the tax returns was obtained from the books and records of the partnership in addition to the rental and interest income which was compiled by Jerry Hirsch. Joseph Frank, petitioner, had nothing to do with the preparation of this 1948 income tax return (155a).

Special Agent James W. Good, of the Intelligence Division, Internal Revenue Service, testified that although he did not conduct the audit of the books and records of the Royal Vending Service, but insofar as he knew, the agents found nothing wrong with its books and records and they appeared correct. Also, that their findings were the same as to the receipt, recording and reporting of the rental and interest income (248a, 249a). Further, that the 1948 income tax return was correct on its face.

The Government in its Bill of Particulars (Ex. D-1) admitted all the deductions contained in the 1948 income tax return to be correct (249a).

In 1948 petitioner had accounts with the Mellon National Bank, Braddock, Pennsylvania, the First Federal Savings and Loan Association, and the Peoples First National Bank and Trust Company, both in Homestead, Pennsylvania.

Petitioner, Joseph Frank, rented a safe deposit box at the Mellon National Bank on November 26, 1946. On January 2, 1947, petitioner and David Frank, leased the same box and became co-users of it (113a) until January, 1951 (236a). The box was 23¼ inches long, 5 inches wide, and 3¼ inches deep which is a large box in which you could put bills four or five times lengthwise and pile them up quite high (321a, 322a).

James W. Good testified that he was a special agent assigned to the Intelligence Division of the Internal Revenue Service in Pittsburgh and that the purposes of the Intelligence Division are to make investigations to determine whether any criminal violations had been made of the Internal Revenue Laws. That their efforts in the investigation of petitioner, was to determine whether any criminal violations had been committed by him; and that he was the special agent who recommended criminal prosecution of petitioner.

The Pittsburgh Intelligence Division office first received information on Joseph Frank of a confidential nature in April of 1948 and as a result thereof requisitioned the 1948 income tax return of petitioner on February 10, 1949, as a matter of routine process. The said 1948 return was received by the Intelligence Division on June 22, 1949, and remained there until March 30, 1951, when Special Agent Good was assigned to make a preliminary investigation of petitioner's 1948 income tax liability and the 1948 return was also assigned to him (61a, 62a).

Special Agent Good then made a preliminary investigation which included a check of public records which lasted until April 26, 1951. On April 10, 1951, he had also been assigned the case jacket of another taxpayer, Thomas Conlin, whose case, on account of being a business partner of Joseph Frank, was joined with the Frank case, which in-

cluded the years 1945 to 1948, inclusive. An Internal Revenue Agent, Thomas, had been assigned to work with Good in a joint investigation of the other taxpayer so a request was made by the Intelligence Division that petitioner's 1948 tax return be assigned to Agent Thomas (63a, 65a).

Revenue Agent Thomas was officially assigned to petitioner's case but did not do any work on it (65a).

Milliard F. L. Stewart testified that in June, 1951, he was group supervisor of the newly formed "Racket Group" and of "Racket Cases", which meant illegal activities of various nature and that the men under him were investigating criminal cases and that his "Racket Group" worked in cooperation with the Intelligence Division (34a-36a).

Mr. Stewart also testified (75a) that his Racket Group was supervised under the Philadelphia Offices of the Intelligence Division and had received a number of names on cards in which there was an intensive drive to be made in this, as there was over the United States in various groups, and upon getting those cards they requisitioned Joseph Frank's returns for years 1948, 1949 and 1950, but found that the 1948 return was in the hands of the Intelligence Division, and he received that direct from the Intelligence Division on June 14, 1951. Further, that this whole Racket program was controlled under a "Racketeer" supervisor in Washington. That the main purpose of the Racket Group investigations was to obtain criminal prosecutions of the designated persons if there was something to prosecute.

Mr. Stewart stated (37a) that in the Racket Program, and he assumed Mr. Frank's case was included in it, they gave specific instructions to the agents to explore a little deeper than they would on an ordinary investigation. That all of the files of these types of cases were marked with a big "R" to designate their type.

At the end of the Government's case it stipulated on behalf of the Government that Internal Revenue Agents Robert Cornell and John J. Donahoe, the first and second Revenue Agents, respectively, assigned to petitioner's case, received case assignment instructions which included the following two paragraphs (360a):

"When the agent has completed the preliminary background on his taxpayer, he should then contact the taxpayer, informing him that a routine examination of his tax return is being made for the year, and that an appointment would be desirable. The taxpayer may then inform the Agent he has an accountant who has prepared the return. Your authority is then complete to contact the accountant. It is advisable to review the accountant's work paper used in the preparations of the tax return. However, this should not be the basis of closing the investigation as the accountant has used the information supplied by the taxpayer and it may not be complete in divulging all the income, nor will it have all the records necessary in verification of deductions or business expenditures.

"Be cautious and alert and cultivate the taxpayer without tipping your hand as he may cooperate to some degree with you, but if he finds out that you are on his trail as an 'R' sleuth, he may clam up, and from then on your job will be much more tedious and a lot of harder work is ahead of you."

(These instructions were not known about, nor introduced in the preliminary hearing.)

Mr. Stewart testified he assigned the Frank case to Revenue Agent Robert Cornell, a member of his racket group, on June 13, 1951, particularly, for the years 1949 and 1950, but didn't know about 1948. Agent Cornell worked on the Frank case for five and one-half days and then resigned from the Service on July 6, 1951. Mr. Stewart then assigned the Frank case to Revenue Agent John J. Donahoe, another agent in his racket group, on July 9, 1951, including the tax returns for the years 1945, 1946, 1947 and 1948 as well as 1949 and 1950.

Robert Cornell testified at the preliminary hearing that he was an Internal Revenue Agent assigned to the "Racket Squad in Pittsburgh, Pennsylvania." That its functions were to examine returns to determine correct tax liabili-

ties and also to go much deeper into an investigation if the tax return indicated such a need and the investigation of criminal fraud, where such possibility was involved (46a). He stated Mr. Stewart assigned petitioner's 1949 return to him on June 13, 1951, and the 1950 return on June 22, 1951, and since these returns were under investigation the 1948 return of Royal Vending Service was picked up from the Collector's office. That he made a preliminary investigation in which he visited a newspaper morgue and read some newspaper clippings which disclosed Joseph Frank had a criminal record and from the knowledge he had obtained in his preliminary investigation it led him to believe that a detailed examination should be made; that he knew Mr. Frank's case would entail a deeper investigation (53a, 56a) and that was why he asked for so many of Mr. Frank's records.

Revenue Agent Cornell further stated that in pursuance to instructions of his group chief, on June 13, 1951, he telephoned Joseph Frank at the office of the Royal Vending Service, identified himself as an Internal Revenue Agent and told him he was conducting a routine examination to determine his correct tax liability and would like to see his records (47a, 48a, 53a, 56a). That Joseph Frank informed him that Mr. Love had his records and he would direct Mr. Love to give them to him. On June 27, 1951, he received from Mr. Love various records of petitioner for which he receipted (47a, 49a) Receipts (14a, 15a); and that some of such records could have been Mr. Frank's for 1948. That he took these records to his office, and from the information contained in them he had sufficient evidence to build up a bank deposits case against petitioner (52a). However, he left the service on July 6, 1951.

John J. Donahoe testified that he was in 1951 an Internal Revenue Agent assigned to the "Racket Squad" in Pittsburgh which made criminal investigations, and on July 9, 1951, was assigned by his group chief, Milliard Stewart, to the Frank investigation for the years 1945 to 1950, inclusive, succeeding Agent Robert Cornell. That the Frank case was

more than a regular examination with some criminal aspects that had to be explored further, but that he did not tell Mr. Frank about these criminal aspects (327a-337a). That, in all probability, he had received the instructions directing the Racket Squad Agents how to be cautious and alert and to cultivate the confidence of the taxpayer without tipping his hand to get his cooperation and not to let him find out he was a member of the Racket Squad as he might clam up (350a-351a).

At the preliminary hearing on the Motion to Suppress Evidence, petitioner testified that in June 1951 Mr. Cornell called him on the telephone and told him he was an Internal Revenue Agent investigating some of his income tax returns, that he was making a routine check of his income tax returns for 1948, 1949 and 1950, although he could be wrong as to the years, to determine whether he owed more taxes to the Government but that he had nothing to be worried about. That Mr. Cornell asked him for certain records and he told him Mr. Love was his auditor and they would try to have those records for him (77a). That as a result of Mr. Cornell's representations he called Mr. Love and directed him to turn over the requested records to Mr. Cornell (78a).

Petitioner testified he first met Mr. Good and Mr. Donahoe in Mr. Love's office and they were introduced to him by Mr. Love as Mr. Good and Mr. Donahoe of the Internal Revenue Service and was told that Mr. Cornell had left the Service and they were continuing the investigation where he had left off. They requested of him a net worth statement which he agreed to have Mr. Love prepare. He did this because Mr. Cornell had told him that it was a routine check and there was nothing to worry about (78a, 79a).

Petitioner further testified that Mr. Love did not at that meeting or after it on the same day tell him Mr. Good was a special agent of the Intelligence Division and they investigated criminal fraud cases. That to the best of his knowledge he never told him (79a); nor did the agents show their credentials to him.

That he directed Mr. Love to co-operate with the Gov-

ernment and give them whatever they requested (80a). That on November 26, 1952, he was called into the office of the Intelligence Division for an interview by Mr. Good and at that time Mr. Good advised him of his constitutional rights in that he did not have to answer any question or make any statement which he felt might incriminate him under Federal Laws. That this was the first time that he had gotten any knowledge or information from any source that led him to believe he was being investigated in a criminal prosecution. That no one had told him such fact up to that date (80a, 81a).

On cross-examination by the Government attorney petitioner testified he turned everything over to the agents because he was told it was a routine check to determine whether or not he owed additional tax (83a). On re-direct examination he stated if he had known about the real purpose of the investigation he would have consulted an attorney before he turned over any records and thought he would have followed his attorney's advice (83a, 84a).

Percy A. Love testified that he was a Certified Public Accountant since 1932. That his Company prepared Joseph Frank's tax return and audited his Company's records at least from 1945 to 1950. That he was first approached by Agent Cornell by telephone in June of 1951 when Cornell told him he wanted to examine the records of Joseph Frank and Mr. Frank had directed him to Mr. Love. An appointment was arranged and Cornell came to his office and they discussed the details of the case and records and information desired. As a result of this meeting Mr. Love arranged to get the records and books for the agent, after being instructed by petitioner to do so (85a). Agent Cornell requested permission to take the records with him but did not tell him he was working with any one else (87a).

Mr. Love also testified that he arranged the meeting at his office with the Agents and Mr. Frank; that he didn't recall whether or not he introduced Mr. Good as a special agent or if he even knew he was a special agent at the time; and it was at this meeting the agents asked for a net worth

statement; that it was his, and Joseph Frank's belief that correct returns had been filed. That to the best of his recollection, originally when the case developed nothing was said about Mr. Frank being investigated by the Intelligence Division and that Mr. Good was a special agent. He believes that after he found out Mr. Good was a special agent on the case he told Joseph Frank. He could not say specifically, however, when and where he told him (86a, 88a).

The Government has admitted (21a) that the official manual of instructions of the Internal Revenue Service provides that in a "joint investigation" of a taxpayer conducted by a Special Agent and a Revenue Agent, the Special Agent is responsible for the criminal features of the case and for the procurement of the proper proof to establish the criminal charge should prosecution be authorized, and the Revenue Agent is responsible for the audit features of the case and the preparation of the record of the proof to support the ad valorem addition to the tax.

Special Agent Good testified it was his usual practice, when he first met a taxpayer, to warn him of his Constitutional rights as to the Fifth Amendment, but that he did not so warn the petitioner at his first meeting, nor second meeting, but only at their last after he had obtained all of his records and the information he wanted.

At the trial of the case Special Agent Good admitted that he did not find any outside independent sources indicating petitioner gambled in 1948 (297a); that he could not definitely determine whether or not petitioner was in the pinball business in 1948. He did not find him in such a business; that he did not check the records of David Frank's pinball business in 1948 or any other year as he didn't think it was necessary if he was using it for a source of income. None of David Frank's records indicated to him that petitioner received money from his business in 1948 (293a-295a).

The Government contended petitioner had likely sources of income from (1) gambling, and (2) from a pinball business and (3) Royal Vending Service.

Special Agent Good stated he found in petitioner's check

books entry of a deposit receipt of $100.00 on July 1, 1948, $25.00 of which was payable to a woman named Boniface and marked pinball salary. Jerry Hirsch, David Frank's bookkeeper, explained to Good that the item was actually a loan repayment to Joseph Frank out of David Frank's salary and that petitioner was not in the pinball business (307a, 308a, 313a).

At the trial, P. A. Love as a Government witness, testified that Joseph Frank could have had net cash of $52.867.49 at the end of 1944, proving it by using petitioner's income tax returns from 1938 to 1944, inclusive, which show total net earnings of $70,445.22, depreciation of $5,825.55; adding them making a total of $76,280.77; and deducting $9,413.28 income taxes paid and $14,000.00 estimated for living expenses of $2000.00 per year, making a balance of $52,867.49 (133a, 134a).

Mr. Love testified that the item of $50,000.00 cash currency on hand as of January 1, 1945, included in the net worth statement (Ex. G-36) was based upon the computations of the net available funds that would have been available from the years of 1938 to 1944, inclusive (135a).

Mr. Love further testified that he had made an examination of Joseph Frank's tax returns, books and records for the years 1938 to 1945 and that he could show Joseph Frank could have had $50,000.00 cash on hand and make all his bank deposits. He added the net income on his returns for the said years, plus one of his wife's separate returns for 1942, which totalled $70,445.22. He then deducted depreciation for the said years which totalled $5,835.55, and income taxes paid which totalled $9,413.28. Adding the totals of $70,445.22 net income and $5,835.55 depreciation, it showed his available funds to be $76,280.77. Deducting taxes paid of $9,413.28 plus $14,000.00 for estimated living expenses, at $2000.00 per year, would leave $52,867.49 as available cash (161a, 162a). He then described the sources from where these funds were or could have been derived (160a-167a).

Mr. Love also testified that he did not recall Joseph Frank being asked how much cash he had as of the end of 1944

by the agents when they were all in his office or that Joseph Frank stated all he had was what was in the bank plus the few dollars in his pocket (170a, 171a).

Special Agent Good testified over objection why, in his opinion, Joseph Frank could not have had $50,000.00 as of January 1, 1945, giving various reasons for same (246a, 247a).

Special Agent Good (250a, 251a) and P. A. Love testified that petitioner was entitled to additional deductions on his 1948 tax return for mortgage interest of $506.68, safe deposit rental fee of $18.00 and architect's fee of $1,032.44, a total of $1,557.12, which was acknowledged in the Government's computation of tax. This reduced the alleged additional income for 1948 from $18,746.72 to $17,189.60.

Mr. Good testified he made an investigation which disclosed $18,746.72 additional income unreported by Joseph Frank for the year 1948 based upon bank deposits, plus cash expenditures. He stated Joseph Frank's bank deposits in 1948 totalled $39,056.50 and that he made cash loans to Irvin Frank of $2,000.00; a $1,000.00 cash loan to Royal Vending Service, and a $2,000.00 temporary capital investment in Royal Vending Service, making a grand total of $44,056.50. From this amount he eliminated various amounts totalling to $25,309.78 which left an excess of $18,746.72 (alleged unreported income) (204a-213a).

Special Agent Good admitted on cross-examination that petitioner had available $405.56 from depreciation on his car as funds available for cash expenditures in 1948. As to funds from depreciation on his real estate, they gave defendant full credit for his 1948 gross rental receipts as deposits, but could not account for $261.00 of this being deposited (206a); also, that defendant had drawn checks to cash or bearer in 1948 totalling $1,000.00 which they could not trace to specific expenditures or loans and which could have been so used or redeposited (261a), that they did not give defendant any credit for cash currency on hand even though he allegedly claimed he had a few dollars in his pocket, because they didn't know how much the few dol-

lars amounted to (262a, 322a); that they never asked or attempted to find out how much cash currency defendant had on hand as of January 1, 1948 (262a, 277a, 278a); and that although they had leads Mrs. Frank had formerly a beauty parlor they never checked upon it for funds available to the Franks (252a, 271a).

The government agents did not give any effect to information given the government by petitioner as to money he could have saved over the earlier year (267a). Neither did they give effect to drawings of $5,885.00 petitioner had from the Modern Home Supply Company in 1946 and which he could have had at the beginning of 1948 (267a, 270a).

Although petitioner made substantial deposits and loans of cash from unidentified sources in January, February, March and April of 1948, the government gave no effect to the fact that he could have had this money on hand at the end of 1947 (271a-276a). Special Agent Good admitted (276a) that it was possible that defendant could have had the cash or large parts of it at the end of 1947 and used it in 1948, and if that was so the government's calculations would be wrong. Another possible source of untaxable funds not checked into were the veterans' disability payments to defendant's son, Melvin, in the year 1947 (277a).

Good admitted on cross-examination that David Frank, co-holder of the safe deposit box with petitioner in 1947 and 1948, had told him Joseph Frank had money in the box. That subsequent to his investigation, but before indictment, he had knowledge that David Frank had filed a copy of an affidavit dated December 9, 1953 with the government which indicated defendant had cash in his safe deposit box which was a lead that defendant could have had cash at the beginning of 1948 and prior to that but it merely indicated the possibility that he had money on hand, but did not show the source from where he obtained it (283a-287a). Also the same as to a copy of an affidavit filed by Jerry Hirsch as being a lead defendant had cash in 1947 and 1948 (287a-289a) but that he didn't bother with it as he considered it hearsay.

Irwin Frank, a cousin of defendant, testified Joseph Frank made him cash loans of $1000.00 each on February 10, and June 24, 1928. That he had asked Joseph for the loan as he had been told by his brother David and Joseph's son, Melvin, that Joseph had a lot of money, also that when Joseph was out with him he always seemed to have a lot of money and usually paid for everything (121a, 122a).

On March 3, 1948, Joseph Frank deposited $3500.00 cash in the First Federal Savings and Loan Association of Homestead. The back of the deposit ticket indicates it was made up of 35-$100 bills.

On March 6, 1948, there was a cash deposit of $8432.06 made up of 167 $50.00 bills, two $20.00 bills, three $100.00 bills, two $5.00 bills, two $1.00 and silver of ninety-six cents (117a, 118a).

The receipt (Exhibit "A", 14a) that Revenue Agent Cornell gave Mr. Love for the records and books taken by him indicated the records he received included petitioner's First Federal Savings & Loan Association book, the Mellon National Bank & Trust Company book and the Peoples First National Bank & Trust Company book.

During the government's presentation of its case, the Trial Judge allowed the Government's attorney (324a, 327a) to present to the members of the Jury, for their perusal, copies of its Exhibit No. 50 (377a-379a), titled "Computation of Corrected Net Income of Joseph Frank for the Year 1948." Petitioner's Counsel had previously objected to the presentation unless the Court gave proper instruction as to its use. At the same time the Trial Judge stated, "Members of the jury, Government's Exhibit No. 50, about which Mr. Good has fully testified, will be shown to you, which is a summary of the bank deposits, cash disbursements for the year 1948, and I say to you that what this statement shows is not conclusive. It neither shows the innocence nor the guilt of the defendant. But it can only be considered with all of the evidence in the case, and after you have heard the charge of the Court concerning the same. So I will let Mr. Paletta at this time—and I have

Mr. Taylor's consent to do this—to pass this exhibit around and let you look at it for a minute or two at this time, and you will return it to the clerk."

Instead of giving the jury members copies of the Exhibit shown to the Court, the government counsel gave copies of it with the additional words typed on it "Alleged by the Government" (326a).

After a discussion at side bar, the Trial Judge told the Jury, "Members of the Jury, there has been some question, so I am going to show you the original exhibit and you will note that the statement on the copy at the foot thereof 'alleged by Government' is not on the original exhibit. (Indicating to Jury.) Just those words, 'alleged by the Government' are not on the original Exhibit."

In his charge to the Jury the trial Judge told them, "* * * During the course of the trial I cautioned you (476) with respect to Exhibit No. 50, which is a computation of corrected net income of the defendant for the year 1948. Strictly speaking, this exhibit is not actual evidence, but merely a summary of other evidence in this case, and it was admitted only for your assistance and convenience in considering the other evidence which it purports to summarize. Exhibits of this nature are permitted where they are based upon voluminous records or documents already in evidence in order to assist you in determining the ultimate facts or results shown by such records or documents, but you are reminded that it is the records and documents which are the actual evidence."

ARGUMENT.

There was not sufficient evidence to support the Court below in its refusal to grant defendant's Motion to Suppress the use as evidence against the defendant the information and evidence derived directly or indirectly, from the defendant's books and records first given to Revenue Agent

Robert Cornell and the Net Worth Statement, books, records and oral admissions later given to Special Agent Good and Revenue Agents Donahoe and Levy, in their investigation of defendant. Further, there was no reasonable basis to sustain the Judge and Jury in allowing and using the alleged unlawful evidence.

It is the contention of the defendant-petitioner that the information and evidence the Government agents obtained from him when he turned over to them all his bank records, cancelled checks, business records, mortgage, bond and stock records and other miscellaneous information, as well as his net worth statement and oral admissions made to them during the investigation, should not have been allowed in evidence by the Trial Judge, who also presided over the preliminary hearing on his motion to suppress evidence in his criminal case.

It is contended by the petitioner that the said oral admissions, information and evidence were obtained from him by the agents through fraud, deception and misrepresentation as to their investigation of him. That it was obtained by "deceit and subterfuge". That he did not waive any of his constitutional rights nor intentionally relinquish them. That the giving of such evidence to the agents was involuntary on his part and against his will. That he was misled into turning over such information under a misapprehension of the true purpose of the investigation.

Constitutional rights are not to be presumed to be lightly waived. See *Wolrich v. United States*, 119 F. Supp. 538, 129 F. Supp. 528.

A tax investigation has certain aspects which set it apart from the investigation of other crimes. Hence, rules that might well serve to determine whether one accused of committing the ordinary crime has waived his rights cannot be applied blindly and rigidly to tax aspects.

If a police officer or an F. B. I. agent interviews a possible defendant about a crime such as robbing, burglary or murder, the purpose of the inquiry is clear from the agent's official position, his well-known duties and the very nature

of the interrogatories. If the person interviewed knows his constitutional rights, he either stands on them or waives them. The visit of an Internal Revenue agent on the other hand does not present the same picture or choice. It does not imply any suspicion of crime but rather an inquiry into whether the taxpayer owes any additional taxes, the common and ordinary type of tax investigation that winds up either in a finding of no deficiency, payment, or litigation on the civil side of the courts. It is well known that tax cases, even with criminal appearances, can be compromised civilly by the Internal Revenue Service and Justice Department. A taxpayer may infer from statements of an investigating agent that he is interested only in determining the amount of taxes due, that the case is being treated as a civil matter.

If the interrogator should happen to be a special agent rather than a revenue agent, his visit may convey to those with tax procedure knowledge the same implications as the visit of an F. B. I. Agent to a wrongdoer. But, in the absence of some disclosure by the special agent of the purpose of his call, the average taxpayer will not be apt enough to realize the difference between the functions of a special agent and of a regular agent. Particularly will this be true if the special agent leads the taxpayer to believe his only function is to determine whether there is a deficiency.

The petitioner, therefore, submits to the Honorable Court that the government agents' statements and acts were made and done in violation of his constitutional rights as provided in the Fourth and Fifth Amendments to the Constitution of the United States. That the agents had an obligation to disclose the true purpose of their visits to the petitioner, which was to discover if he had committed any criminal acts by evading payment of income taxes. Particularly so, as this case from its very inception was started by the Intelligence Division of the Internal Revenue Service and then carried on later by members of its "Racket Group" in cooperation and under the control and supervision of Intelligence; and both being groups to investigate criminal fraud.

Also, that the Intelligence Division had some information as to possible criminal fraud as early as April 1948; even before it was time for petitioner to file his return.

In actuality, the so-called revenue agents assigned to the Racket Group were really criminal fraud investigators and not merely Revenue Agents; their investigations were not the usual and ordinary short, routine examinations.

In view of the testimony and admissions of the Government agents, and their prior knowledge of a possible criminal act committed by the petitioner, the question can be simply posed as follows: Was there a fraud and deceit practiced upon the petitioner in violation of his Constitutional rights when a Revenue Agent assigned to a crime investigating group, designated as the "Racket Group" under the control and supervision and working in co-operation with the Intelligence Division of the Internal Revenue Service and its Agent was assigned to inspect the records of the petitioner with the sole purpose of determining if the petitioner's tax return was criminally false and fraudulent, but actually telling the petitioner, under instructions of his superior officer, that his investigation was in the form of a routine check only to see if he owed any additional taxes; and which was done to disarm the petitioner from any thoughts of criminal prosecution and to obtain his records by such misrepresentations.

That the underlying purpose in investigating petitioner's tax returns was to find evidence of criminal wrong-doing on his part; and that the representations of a routine tax investigation was but a pretext and subterfuge to accomplish the underlying purpose.

The petitioner's motion to suppress evidence is based upon the constitutional guarantee against unlawful searches and seizures of the Fourth Amendment and the privilege against self-incrimination contained in the Fifth Amendment. In resisting the motion the Government contends that the search was not unlawful since the examination was conducted with the consent of the petitioner, and that the records were voluntarily and understandably given.

It is not known how conversant the petitioner was with these said constitutional amendments, had the agents disclosed the true purpose of their visits, with his background of little schooling, but even though the Court of Appeals finds the agents did not have to warn him of such rights, this failure, however, coupled with the more salient reason of tricking petitioner into releasing his books and records under the guise of a routine tax investigation, when in truth and in fact the material was examined with the view of ascertaining evidence of criminal wrongdoing, poses an issue which strikes at the very core of constitutional immunity.

The fundamental question to be resolved is whether the petitioner consented to the examination of his books and records, net worth statement and made admissions, having regard to the facts and circumstances existing at the times the various agents availed themselves of the books and records.

In order to determine the answer to this question, the circumstances under which the alleged consent was given must be borne in mind. All the agents testified, in so many words, including Group Chief Stewart, that the function of their investigation was to obtain evidence of criminal wrongdoing, if present, from the very beginning of the petitioner's tax matter and investigation, but this was not disclosed to the petitioner. Here, so far as he knew or had been informed, his books, records and papers and oral admissions were being examined and obtained by the agents to establish his proper civil liability.

From a review and perusal of the decisions, it is apparent that the law distinguishes between failure on the part of a federal government investigator, to disclose the real and true purpose of his investigation at its inception when suspicion of criminal wrongdoing exists and the discovery of criminal wrongdoing in the course of a routine investigation. It is submitted that to secure evidentiary matter without making such disclosure when criminal wrongdoing is suspected, constitutes a fraud and deceit upon the taxpayer in violation of his constitutional rights against self-incrimi-

nation. U. S. C. A. Constitution Amendments 4 and 5. *United States v. Lipshitz*, 132 F. Supp. 519.

To permit evidence to be obtained against a defendant by the means here employed would be to encourage overzealous and less scrupulous officers and agents of law enforcement agencies to chip away rights guaranteed by the Constitution to defendants by trick and artifice. The dividing line between proper investigative procedures and those which encroach improperly upon constitutionally guaranteed rights is shadowy and ill-defined, but the device here used places itself clearly on the wrong side of that line. *United States v. Guerrina*, 112 F. Supp. 126; *Gouled v. United States*, 255 U. S. 303.

In this tumultuous age of challenge and peril to free institutions everywhere in the world, the bulwark of the Constitutional protection upon which rests the foundation of all our freedoms, must be held sacrosanct in the application of law. To deviate or compromise these sacred rights is to imperil our basic freedoms.

It may be that it is the obnoxious thing in its mildest and least repulsive form, but illegitimate and unconstitutional practices get their first footing in that way, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be literally construed. *Boyd v. United States*, 116 U. S. 616, 635; *Weeks v. United States*, 222 U. S. 391, 392; *Counselman v. Hitchcock*, 142 U. S. 587; *Silverthorne Lumber Company v. United States*, 251 U. S. 325, 385.

Another significant difference between the ordinary criminal investigation and a tax investigation is the fact that a taxpayer has no right to withhold records from the investigating agent if the purpose of the investigation is to determine civil liability. The Circuit Court of Appeals in its opinion states that under the statutes the Government has authority to examine books, papers and records. However, where the investigation has as its object criminal prosecu-

tion, the Constitutional guarantees override the statutes compelling the production of all pertinent information bearing on the correctness of the returns. See *Boyd v. United States*, 116 U. S. 616.

A waiver of constitutional rights should be inferred only where it is evidenced by an intelligent, affirmative act. See *Johnson v. Zerbst*, 304 U. S. 458; *Johnson v. United States*, 333 U. S. 10.

Mere acquiescence and search "reasonably attributed to a regard for the authority of the law" is no waiver. *Amos v. United States*, 255 U. S. 313.

In view of the foregoing it is therefore contended by the petitioner that his constitutional rights were violated in that he was induced under a misapprehension of the true facts and circumstances to give his consent to an examination under circumstances which rendered that consent nugatory and the search unreasonable and therefore unlawful. That his rights were further violated and compromised in that he was required to give testimony against himself without proper warning; that such evidence obtained unlawfully should be suppressed.

In *Turner v. United States*, 222 F. 2nd 926, cert. denied, 250 U. S. 831 (1955), it appears that the defendants did not testify that they were misled by the actions of the agents.

In *United States v. Burdick*, 214 F. 2nd 768 (3rd Cir. 1954), remanded, 248 U. S. 905, affirmed on remand 221 F. 2nd 932, cert. denied, 350 U. S. 831 (1955), the facts were different than the instant case. Although the investigation was begun by a special agent, he advised the defendant that whatever he gave him would be voluntary on his part.

It is to be noted that it was the Revenue Agents attached to the Racket Group that testified as to its being a routine investigation, when it was actually a routine criminal investigation.

Agent Cornell testified that the reason for asking for so many of Joseph Frank's books and records when he first called him was that he knew his investigation was more than a routine investigation and he knew he had to go deeper than usual from his information on hand.

Special Agent Good stated to the petitioner's representatives at their last interview in his office that their investigation was not just a civil matter but was a criminal investigation.

There was not sufficient evidence to support the Court below in its refusal of defendant's motions for directed judgments of acquittal, and the court erred in so doing.

It is contended by the petitioner that the government did not produce sufficient, clear and convincing evidence to prove a prima facie case and therefore the trial Judge should not have permitted the case to go to the jury, but instead, should have directed a judgment of acquittal.

In *Holland v. United States*, 348 U. S. 121, your Honorable Court held that in net worth cases (1) "proof of a likely source from which the jury could reasonably find that the net worth increases sprang, is sufficient; (2) "an essential condition in cases of this type is the establishment with reasonable certainty, of an opening net worth, to serve as a starting point from which to calculate future increases in the taxpayer's assets. The importance of accuracy in this figure is immediately apparent, as the correctness of the result depends entirely upon the inclusion in this sum of all assets on hand at the outset; (3) "in this connection the taxpayer frequently gives leads to the government agents indicating the specific sources from which his cash on hand has come, such as prior earnings, stock transactions, real estate profits, inheritances, gifts, etc. Sometimes these leads point back to old transactions far removed from the prosecution period. Were the government required to run down all such leads it would face grave investigative difficulties; still its failure to do so might jeopardize the position of the taxpayer; and (4) the method requires assumptions, among which is the equation of unexplained increases in net worth with unreported taxable income. Obviously such an assumption has many weaknesses. It may be that gifts, inheritances, loans and the like account for the newly acquired wealth. There is great danger that the jury may assume that once the government has established the fig-

ures in its net worth computations, the crime of tax evasion automatically follows. The possibility of this increases where the jury, without guarding instructions, is allowed to take into the jury room the various charts summarizing the computations; bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them.

The word "likely" means good reason to expect or believe. Webster's International Dictionary.

In the instant case the Court of Appeals finds that there was a showing of possible source of other income than that reported by the defendant. That as petitioner was in a business, Royal Vending Service, it was enough to be used as a possible source of additional income. To this, petitioner must disagree and offers the proposition that there must first be a showing by the government with competent evidence that the business was capable of producing the additional income. This, the government failed to do and could not do. *Thomas v. Commissioner*, 232 F. 2nd 520, 526.

As to the second likely source, gambling, the petitioner contends that the government in failing to produce any direct and independent competent proof of same is restrained from using any of the admissions of the petitioner due to lack of corroboration of same. The various years' tax returns used by the government to prove such gambling are too remote in time to be relevant and competent. What petitioner did or might have done several years before 1948 had no proper bearing to prove his actions in 1948.

The alleged third likely source, pinball business, is so weak as stated by the courts below, that it does not need any further argument pertaining to it, and it is submitted that its facts are not similar to those in the *Adonis* case referred to by the Court of Appeals. *United States v. Adonis*, 221 F. 2nd 717. There has been no "calculated misrepresentation" as in the *Adonis* case. As stated by the Court in *Massei v. United States*, 241 F. 2nd 895, "* * * the government had to present some evidence of actual graft taking or opportunity for such in order to establish the element of likely source

independent of the admissions. Since it failed to do this, the district court should have stricken the evidence concerning the admissions from the record. And since without the admissions there was no evidence of likely source in the record, it should have granted appellant's motion for a verdict of acquittal * * *." Also, *United States v. Donovan*, 142 F. Supp. 703. The government has not shown any good reasons to have anyone believe that additional income came from such sources.

It is respectfully submitted that likely source pertains to bank deposits cases as well as net worth cases.

It is also contended by the petitioner that inasmuch as the government depends upon the net worth method as well as the bank deposits method, that if its starting points in same and other items therein are incorrect, then their bases are wrong and incorrect and their case must fall. It is respectfully submitted that such starting points were wrong and their computations therefore have no lawful worth. *Holland v. United States*, supra; *Bryan v. United States*, 175 F. 2nd 223; *Fairchild v. United States*, 240 F. 2nd 944; *Calderon v. United States*, 348 U. S. 160; and *Altruda v. United States*, 224 F. 2nd 935.

The government's starting points are incorrect for the following reasons:

1. Special Agent Good admitted at the trial that he could not state definitely and honestly from his own knowledge of the facts of the investigation, one way or another, as to whether or not petitioner had cash currency in his safe deposit box at the beginning of 1948.

2. The government did not recognize that petitioner had cash in his safe deposit box as of January 1, 1948.

3. The affidavits and leads of and from Jerry Hirsch and David Frank as to cash held by Joseph Frank at January 1, 1948, which leads should have taken as true by the Court.

4. The petitioner deposited cash currency and made cash loans in early 1948 from funds that he could have had as of January 1, 1948.

5. The possible receipts of moneys from Petitioner's son Melvin in 1947.

6. The 1946 withdrawals of moneys from petitioner's Modern Home Supply Company as a source of cash in 1948.

7. Mr. Love's testimony that petitioner could have had $50,000.00 as of January 1, 1945.

Further, the petitioner had, or could have had, cash currency, derived from his checks drawn to cash totalling $1000.00 in 1948 and which the agents did not allow him as an offset; although this should have been allowed, *United States v. Caserta*, 199 F. 2nd 905.

Also, the petitioner had available funds of at least $666.56 from his depreciation which could have been used by him for loans or expenditures or deposits, but it was not allowed him by the agents. See *United States v. Fenwick*, 177 F. 2nd 488.

As to the findings of the appeals court that there was corroborative testimony produced which tended to show that petitioner could not have had $50,000.00 in 1945, there was also the testimony of P. A. Love C. P. A., a very credible witness, indicating petitioner could have had such a sum available at that time.

The Trial Judge committed prejudicial and reversible error by allowing the members of the jury to see and have the use of the government's chart, Exhibit 50.

This contention is based upon the facts that the computations were not complete and correct, particularly as to the corrected net income. There were many deductions still to be taken off the alleged unreported additional income such as Mortgage interest, safe deposit box fee, and archi-

tects' fees. There was also the possibility, which was not explained, about the various items of the cash currency which petitioner could have had on hand at the beginning of 1948 as well as the allowances for depreciation and checks drawn to cash. *Lloyd v. United States*, 226 F. 2nd 9, *United States v. Altruda*, 224 F. 2nd 935.

CONCLUSION.

It is respectfully submitted that in consideration of the foregoing reasons the petition for a writ of Certiorari should be granted by this Honorable Court.

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Attorneys for Petitioner.

APPENDIX.

UNITED STATES COURT OF APPEALS.

FOR THE THIRD CIRCUIT.

No. 12,146.

UNITED STATES OF AMERICA

vs.

JOSEPH FRANK,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

Argued April 16, 1957.

Before GOODRICH, STALEY and HASTIE, Circuit Judges.

OPINION OF THE COURT

(Filed May 15, 1957.)

By GOODRICH, Circuit Judge.

This is an appeal from a judgment of the United States District Court for the Western District of Pennsylvania

convicting Joseph Frank of violation of Section 145(b) of the Internal Revenue Code of 1939, 26 U. S. C. A. §145(b).

The first point raised by the appellant is his claim that his constitutional rights under Amendments Four and Five were violated. On behalf of Frank it is urged that papers, books and records belonging to him were turned over to revenue agents by reason of their fraudulent representation to him concerning the nature of the examination they were making or about to make. Taxpayer says that he was led to believe that a routine audit was to be made and if he had known there was a special agent also assigned to his case he would not have given up his papers without advice of counsel. Cf. *Gouled v. United States*, 255 U. S. 298 (1921).

He also brings to our attention certain instructions which were given to the revenue agents concerning investigation of a so-called "racket group" case which this was. These instructions were as follows:

> "When the agent has completed the preliminary background on his taxpayer, he should then contact the taxpayer, informing him that a routine examination of his tax return is being made for the year, and that an appointment would be desirable. The taxpayer may then inform the agent that he has an accountant who has prepared the return. Your authority is then complete to contact the accountant. It is advisable to review the accountant's work papers used in the preparation of the tax return. However, this should not be the basis of closing the investigation as the accountant has used the information supplied by the taxpayer and it may not be complete in divulging all the income, nor will it have all the records necessary in verification of deductions or business expenditures.
>
> ". . .
>
> "Be cautious and alert and cultivate the confidence of the taxpayer without tipping your hand as he may cooperate to some degree with you, but if he finds out that you are on his trail as an 'R' sleuth, he may clam

> up, and from then on your job will be much more tedious and a lot of harder work is ahead of you."

We agree with the appellant that the tone of these instructions is greatly to be deplored. We think they can be easily misunderstood by an agent to urge him to get over the line into fraudulent conduct in an effort to capture a tax evader. They are not the kind of instructions which tend to foster good relations between a government and its citizen taxpayers even though some taxpayers may have strayed from the path of accuracy.

The defendant's point about this matter, however, has been thoroughly litigated before. There was, before trial, a motion under Rule 41(e), Federal Rules of Criminal Procedure, for the return of property and to suppress evidence. There was a hearing upon this motion, a very thorough hearing. The district judge overruled the motion and filed a memorandum opinion setting out why, in his opinion, the evidence failed to sustain the contention that fraud was practiced by the government agents. —F. Supp. —(W. D. Pa. Jan. 4, 1956).

Again at the close of the trial the judge charged the jury, at the defendant's request, that:

> "Any such evidence, including papers, business books, records, bank records, and cancelled checks, as well as oral and written admissions obtained by the defendant by fraud, force, persuasion, misrepresentation, trickery, or deceit of the Government agents, if any, should not be considered against this defendant."

The jury's finding of guilty necessarily involved a finding in agreement with that of the court at the preliminary hearing on the motion.

The appellant therefore must demonstrate that there was no reasonable basis to sustain the conclusion of both the judge and the jury. It is quite clear that he cannot do this. The agents testified they did describe the investigation as

"routine" but denied that they ever told the taxpayer they were merely conducting an investigation to determine routine civil tax liability. See the thoughtful discussion by Judge Soper in *Turner v. United States*, 222 F. 2d 926 (4th Cir.), cert. denied, 350 U. S. 831 (1955). Every investigation is, in a sense, routine at the start because the agents cannot know until they get into a given case what sort of liability will grow out of their investigation. We have recently held that the agent is not required to warn the defendant that he did not have to give any information that might be used against him in a criminal proceeding. *United States v. Burdick*, 214 F. 2d 768 (3d Cir. 1954), remanded, 348 U. S. 905, affirmed on remand, 221 F. 2d 932, cert. denied, 350 U. S. 831 (1955). Under the statutes the government has authority to examine books, papers and records (see Int. Rev. Code of 1954, §7602; Int. Rev. Code of 1939, §3614), and we do not think any taxpayer considers an audit by a revenue agent to be a call for purely social purposes. The individual conclusions of the judge and the jury are well supported.

An income tax deficiency for the year 1948 only was involved. The government proved its case by the "bank deposit expenditure method" and for corroboration used the "net worth method." Each has become standard in income tax prosecutions. And each is, obviously, a method of proving an offense by circumstantial evidence. All the points which defendant raises in this Court were discussed by the district judge in his opinion following motion for new trial in the district court. See — F. Supp. — (W. D. Pa. Dec. 4, 1956). We need not repeat the detailed statement made in that opinion showing the careful allowances made by the revenue authorities in order not to charge the defendant with a greater discrepancy between income received and income reported than he should be called upon to answer for. We have checked these statements with the testimony and find them accurate.

There was also a showing of possible source of other income than that reported by the defendant. He was a

partner in a vending machine concern. Defendant says that the government's revenue agent admitted that this concern's books appeared to be in order. We make nothing of that point however. That business concern is not on trial and it is enough that partnership in the business was shown as a possible source of additional revenue. It was also shown that the defendant on several of his income tax returns had reported a gain from "sporting enterprises," an euphemistic term for gambling profits. He did not return any of 1948 and it is suggested that this form of activity was another possible source of income. This point was quite thoroughly developed and the defendant's method of bookkeeping, or lack of bookkeeping, for his sporting enterprises was shown. This was all relevant and its weight for the jury. There was also the possibility of income from a pinball business although the trial judge did not think this was so very strong and we agree with him. He thought it could be, however, a "significant indication" of a likely source under our decision in *United States v. Adonis,* 221 F. 2d 717, 720 (3d Cir. 1955).

The proof concerning what the defendant had on hand at the beginning of the taxable year in question is relevant to the bank deposit theory of the case as well as that of net worth. If his deposits or expenditures came from a safety deposit box in a bank or from a hoard at home, obviously they are not "income" when taken from their storage place and deposited in a checking account nor when spent. The amount which the defendant did have on hand at the beginning of 1948 was, as discussed below, the subject of testimony by government witnesses.

There was a dispute over the amount of the defendant's cash on hand at the beginning of the year for which evasion is charged. The defendant says he had $29,000. at that time, the remainder of $50,000. which he claimed to have had in 1945. He admitted, in one interview, that all he had in 1945 was what was in a pocket and what he had in the banks. This was about $10,000. Then follows the argument

that the prosecution cannot depend upon the petitioner's admission alone but must offer corroborating evidence. This is based upon *Smith v. United States,* 348 U. S. 147 (1954), where the matter is fully discussed and where the court went far in extending the rule requiring corroboration of not only confessions in income tax cases but admissions as well.

Whether this requirement of corroboration of defendant's admissions applies where the net worth method itself is used only in corroboration of the bank deposit method the court did not say for that question was not before it. But in any event there was corroborative testimony here tending to show that Frank could not have had $50,000. in 1945. This evidence is discussed in detail in the opinion of the district judge and need not be set out again here.

There was a sufficient showing of intent. The prosecution showed understatement of income for several other years specifically for the declared purpose of showing intent. This is itself enough. *Holland v. United States,* 348 U. S. 121 (1954), rehearing denied, 348 U. S. 932 (1955).

The jury was well and fully instructed both as to law and fact. The defendant was represented by experienced counsel and ably defended. In the course of this review we have been back again over the series of cases beginning with *Holland v. United States,* supra. The government's case meets the requirements laid down by the Supreme Court in that series of decisions.

The sentence imposed by the trial court which is in conformity with the provisions of the statute is not reviewable here, no showing of an abuse of discretion having been shown. *Price v. United States,* 200 F. 2d 652 (5th Cir. 1953); *United States v. Cosentino,* 191 F. 2d 574 (7th Cir. 1951).

The judgment of the district court will be affirmed.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS.
FOR THE THIRD CIRCUIT.

No. 12,146.

UNITED STATES OF AMERICA,
vs.
JOSEPH FRANK,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

Present: GOODRICH, STALEY and HASTIE,
Circuit Judges.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:
IDA O. CRESKOFF,
Clerk.

May 15, 1957.

Office - Supreme Court, U.S.
FILED
AUG 2 1957
JOHN T. FEY, Clerk

No. 191

In the Supreme Court of the United States

October Term, 1957

JOSEPH FRANK, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

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UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 32-37) is not yet reported. The two opinions of the District Court, the one denying a motion to suppress evidence (R. 91a-94a), and the other denying a motion for a new trial (R. 382a-393a), are also unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 15, 1957. (Pet. 38.) The petition for a writ of certiorari was filed on June 13, 1957. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether a revenue agent instituting an examination of a taxpayer's income tax returns is required to warn the taxpayer at the outset that the investigation may result in criminal prosecution.

2. Whether the evidence was sufficient to support the verdict.

3. Whether a chart summarizing the Government's analysis of petitioner's bank deposits was properly admitted in evidence.

STATUTE INVOLVED

Internal Revenue Code of 1939:

> Sec. 145. PENALTIES.
>
> * * * * *
>
> (b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.* Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.
>
> * * * * *

(26 U.S.C. 1952 ed., Sec. 145.)

STATEMENT

On March 9, 1955, petitioner was indicted in the United States District Court for the Western District

of Pennsylvania for wilful attempted evasion of a large part of his income taxes for the year 1948, in violation of Section 145(b) of the Internal Revenue Code of 1939. The amounts of net income and tax due, as reported and as corrected, are as follows (R. 4a):

	Reported		Corrected	
	Income	Tax	Income	Tax
1948	$6,433.89	$657.70	$25,180.61	$5,536.24

Petitioner was convicted after an eight-day jury trial (R. 376a), and on December 11, 1956, he was sentenced to eighteen months imprisonment and fined $2,500 (R. 393a-394a).

Prior to trial, petitioner filed a motion (R. 4a-13a) asking that certain books and records obtained from him by revenue agents during their investigation, and certain admissions made by him to them, be suppressed as evidence. He alleged that this evidence had been obtained by fraud and misrepresentation on the part of the agents, without a warning to him that a criminal investigation was under way, and without his voluntary consent. He further alleged that Revenue Agent Cornell, who first contacted him, said that he had come to make "a routine audit" to ascertain petitioner's "correct civil liability". (R. 6a.) There was an extended hearing on the motion (R. 25a-90a), at which Agent Cornell testified that he told petitioner at the outset that he was conducting a "routine investigation" to determine his "correct tax liability" (R. 48a). He denied that he had assured petitioner that he had come to ascertain his correct "civil" lia-

bility. (R. 55a.) Furthermore, it was undisputed that petitioner consulted with his accountant before he turned anything over to the agent. (R. 48a-49a, 77a-78a, 85a.) Petitioner testified that Agent Cornell told him at the first contact that he was making a "routine check" and that he had "nothing to worry about". (R. 77a, 78a).) The District Court found as a fact that there had been no representation to petitioner that "only civil liability was contemplated" in the investigation (R. 92a), and the motion was denied (R. 94a).

The evidence to support the verdict may briefly be summarized as follows:

Petitioner's income tax returns for the years prior to 1948 frequently reported income from "sporting enterprises" (R. 173a-175a, 182a), and he admitted to the agents that gambling had been one of the sources of his income since January 1, 1945 (R. 222a-223a, 228a). However, he kept only fragmentary records of his gambling income, which he never showed to the accountant who prepared his returns and which he did not retain. (R. 182a-183a, 223a-224a, 241a.) Most of petitioner's reported income for the year involved in this case, 1948, came from a vending machine partnership, the books of which appeared, on the surface, to be in proper order. (R. 147a, 153a, 248a.) There was, however, some evidence to indicate that he received unreported income during 1948 from a pinball machine business. (R. 235a, 293a-294a.)

During their investigation, the revenue agents discovered that petitioner had deposited substantially

more funds in his bank accounts during 1948 than the income he had reported in his returns for that year, and they thereupon set about to make an analysis of the deposits. (R. 242a.) From the total amounts deposited, the agents carefully eliminated all sums which had actually been reported in petitioner's return and all sums which could possibly have been non-income items, such as loans, reimbursed expenses and repayments of capital. (R. 204a-212a.) To the remaining amount, the agents added a few nondeductible cash expenditures which had not come from any of petitioner's bank accounts. (R. 202a-204a.) As a result of this calculation, the agents concluded that petitioner had failed to report income in the amount of $18,746.72 for the year 1948. (R. 212a.) Similar calculations for the preceding years revealed unreported income in the following amounts (R. 216a-222a):

1945	$10,692.79
1946	11,377.43
1947	15,184.61

At an early stage of the investigation petitioner told the agents that practically all the cash he had on hand as of January 1, 1945, was approximately $10,000 in the bank. (R. 225a.) He also said that he had a safe deposit box but had never kept any cash in it. (R. 227a.) Four months later he submitted a net worth statement in which he claimed $50,000 in currency as of January 1, 1945, and he told the agents that this had been accumulated between 1940 and 1944. (R. 228a-231a.). The following month, he said that some of this currency had been acquired

during the 1930's, but became confused when it was pointed out that he had worked for the W. P. A. (R. 238a.) He then claimed that a considerable portion of the $50,000 had been kept in his safe deposit box. (R. 236a.) He said, however, that he had kept most of the money in a strong box at home and that he had kept a running record of it, but he could neither produce the record nor give an account of the expenditure of the cash. (R. 237a-239a.)

There was other evidence to discredit the alleged $50,000 cash hoard. From 1920 to 1937, petitioner either filed nontaxable returns or no returns at all. For the year 1941, he owed income taxes in the amount of $4,800, but the Government had to file a lien to obtain payment and the amount was not paid in full until late in 1944. In 1945, he cashed $1,200 worth of small bonds, and in 1945 he borrowed substantial sums from his vending machine partnership. Upon the basis of the evidence as to the funds available to petitioner, the Government showed that, in order to have accumulated $50,000 in cash by the beginning of 1945, he would have had to support himself, his wife and his two children for eighteen years on approximately $8 a week. (R. 246a-247a.)

ARGUMENT

1. Petitioner's position in the trial court was that he had been deliberately misled by Revenue Agent Cornell into believing the investigation of his returns to be a purely *civil* matter. In the motion to suppress, petitioner alleged that Cornell stated that his purpose was to ascertain the correct civil liability (R.

6a), and at the hearing petitioner testified that Cornell assured him that he had nothing to worry about (R. 77a). Cornell denied having given any such assurances. Furthermore, it was undisputed that petitioner consulted his accountant before he gave Cornell anything and that there was no representation to the accountant that a purely civil audit was contemplated. (R. 77a-78a, 90a.) The accountant advised petitioner to cooperate fully with the agent because "we felt that there was nothing to hide and that the taxpayer had divulged all his income". (R. 87a.) The District Court decided the testimonial conflict as to misrepresentation adversely to petitioner. Moreover, the jury implicitly reached the same conclusion, for the trial judge, in an excess of caution, instructed it to disregard any evidence it found to have been obtained by misrepresentation, an evidentiary issue which he had himself already determined.[1] (R. 374a-375a.) It must be taken as settled, then, that what Cornell said in his first conversation with petitioner was that he was making a routine investigation to determine petitioner's correct tax liability. In view of the fact that petitioner took the precaution to consult his accountant and was advised to cooperate, the District Court and the jury were amply justified in concluding that petitioner could not have been, in fact, misled by this introduction.

Petitioner is, therefore, driven to the contention in

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[1] See *Ford* v. *United States*, 273 U. S. 593, 605; *Steele* v. *United States*, 267 U. S. 505, 511; *Gila Valley Ry. Co.* v. *Hall*, 232 U. S. 94, 103.

this Court (Pet. 20-27) that, whenever a revenue agent suspects a criminal violation (or a possibility of one) when he begins an investigation, his conduct is *per se* fraudulent and misleading if he does not warn the taxpayer of the possibility of prosecution. It is, however, well settled that criminal investigators, and revenue agents in particular, are not required to issue any such warning. *United States* v. *Achilli*, 234 F. 2d 797, 805 (C.A. 7th), affirmed on other issues, 353 U. S. 373; *Turner* v. *United States*, 222 F. 2d 926, 930-932 (C.A. 4th), certiorari denied, 350 U. S. 831; *United States* v. *Burdick*, 214 F. 2d 768 (C.A. 3d), certiorari denied, 350 U. S. 831; *Montgomery* v. *United States*, 203 F. 2d 887 (C.A. 5th); *Zacher* v. *United States*, 227 F. 2d 219 (C.A. 8th), certiorari denied, 350 U. S. 993.[2] It must be apparent to any taxpayer that a "routine investigation of his tax liability" may lead to criminal proceedings, unless he is specifically advised that only his civil liability is involved. Both the District Court and the jury found that there had been no such assurance here.

2. Petitioner's attack upon the sufficiency of the Government's evidence (Pet. 27-30) falls with the

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[2] See also *Wilson* v. *United States*, 162 U. S. 613, 621-624; *Powers* v. *United States*, 223 U. S. 303, 312-314; *Himmelfarb* v. *United States*, 175 F. 2d 924, 938 (C.A. 9th), certiorari denied, 338 U. S. 860; *United States* v. *Heitner*, 149 F. 2d 105, 107 (C.A. 2d), certiorari denied *sub nom. Cryne* v. *United States*, 326 U. S. 727; *United States* v. *Block*, 88 F. 2d 618, 620-621 (C.A. 2d), certiorari denied, 301 U. S. 690. The only case cited by petitioner which gives any support to his position at all is *United States* v. *Lipshitz*, 132 F. Supp. 519 (E. D. N. Y.).

assumption upon which it is based. Petitioner assumes that the Government attempted to establish the unreported income by proof of unexplained increases in his net worth. Actually, the Government relied principally upon an analysis of petitioner's bank deposits.

The courts of appeals have long recognized that the existence of current income may be inferred when the Government shows that the taxpayer was engaged in an income-producing business and that he made periodic deposits in bank accounts under his control, and when the revenue agents have thoroughly analyzed these deposits and have made a reasonable effort to exclude all non-income items such as redeposits, transfers between accounts, loans, gifts, or deposits from a prior accumulation. *Gleckman* v. *United States*, 80 F. 2d 394, 399-400 (C.A. 8th), certiorari denied, 297 U. S. 709; *United States* v. *Venuto*, 182 F. 2d 519, 521 (C.A. 3d); *Beard* v. *United States*, 222 F. 2d 84 (C.A. 4th), certiorari denied, 350 U. S. 846; *Stinnett* v. *United States*, 173 F. 2d 129 (C.A. 4th), certiorari denied, 337 U. S. 957; *Holbrook* v. *United States*, 216 F. 2d 238 (C.A. 5th), certiorari denied, 349 U. S. 915; *Kirsch* v. *United States*, 174 F. 2d 595, 601 (C.A. 8th); *Graves* v. *United States*, 191 F. 2d 579 (C.A. 10th). The nature of taxpayer's business and the periodicity of his deposits support the inference that the deposits represent current income and not funds dribbled into the accounts from some prior cash accumulation. *Malone* v. *United States*, 94 F. 2d 281, 286, 287-288 (C.A. 7th), certiorari denied, 304 U. S. 562.

In this case, the agents discovered that for a period of at least four years petitioner's bank deposits considerably exceeded the amounts of income reported in his returns (*supra*, pp. 4-5), and there was evidence from which the jury could properly have concluded that he was engaged in three income-producing businesses during 1948, gambling,[3] the vending machine partnership, and the pinball operation (*supra*, p. 4). The agents carefully analyzed the deposits and excluded all which could possibly have been non-income items (*supra*, p. 5). Then, in an effort to determine what explanation petitioner might have, they asked how much cash he had as of January 1, 1945, and were told that he had practically none except $10,000 in the bank (*supra*, p. 5). His subsequent claim of $50,000 was, as has been shown (*supra*, pp. 5-6), completely discredited.

There was, therefore, evidence of excess bank deposits, and evidence of sources from which it could reasonably be inferred these deposits derived. Since the Government relied on proof of periodic bank deposits, the establishment of a net worth starting point was unnecessary. However, it is clear that the net worth statement which was used in corroboration of the bank deposits proof did have an adequate starting point. The only real dispute on this was whether petitioner had $10,000 or $50,000 in currency on January 1, 1945, and the evidence on that score completely discredited petitioner's claim.

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[3] Petitioner's admissions in this respect were sufficiently corroborated by his prior returns. *Warszower* v. *United States*, 312 U.S. 342, 347.

3. Petitioner also complains (Pet. 30) because the trial judge allowed the jury to see a chart (R. 377a-379a) showing the Government's bank deposit computations. However, petitioner's counsel consented to it at the time the chart was submitted to the jury (R. 325a-326a), and the jury was properly instructed as to the use they could make of such a chart (R. 372a). *Holland* v. *United States*, 348 U. S. 121, 128.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST, 1957.

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